Eng, Sharon

From: Lizanne Davis [Lizanne.Davis@fmc.com]
Sent: Thursday, October 31, 2013 8:20 AM
To: Boyd, Andrew; David Heineck; Bill Bacon
Cc: Eng, Sharon
Subject: RE: FMC SEP 14 approval letter placed in the out going mail on Wednesday - attached

Dear Andy,
Thanks so much and I'll forward to SMT and SDP, as well as Dominic Alexander of Exponent so that Phase 2 can commence.
Best,
Liz

Lizanne H. Davis
Director, Goverment Affairs
FMC Corporation
1050 K Street, NW
Suite 600
Washington, DC 20001

202.956.5211 (Office), **202.412.1055** (Cell)
202.956.5235 (Fax)

lizanne.davis@fmc.com

From: Boyd, Andrew [mailto:Boyd.Andrew@epa.gov]
Sent: Thursday, October 31, 2013 10:55 AM
To: Lizanne Davis; David Heineck; Bill Bacon
Cc: Eng, Sharon
Subject: FMC SEP 14 approval letter placed in the out going mail on Wednesday - attached

Click here to report this email as spam.

Eng, Sharon

From: Schanilec, Kevin
Sent: Thursday, October 31, 2013 8:49 AM
To: Eng, Sharon
Subject: FW: FMC SEP 14 approval letter placed in the out going mail today.
Attachments: FMC SEP 14 Approval dated 10-30-13.pdf

Kevin Schanilec
Senior Enforcement Engineer
EPA Region 10 (OCE-127)
1200 Sixth Avenue, Suite 900
Seattle, WA 98101
206-553-1061

From: Wells, Melba
Sent: Wednesday, October 30, 2013 5:16 PM
To: Schanilec, Kevin; Boyd, Andrew
Subject: FMC SEP 14 approval letter placed in the out going mail today.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 10
1200 Sixth Avenue, Suite 900
Seattle, WA 98101-3140

OCT 30 2013

OFFICE OF
COMPLIANCE AND ENFORCEMENT

Reply to: OCE-127

Certified Mail Return Receipt Requested

William Bacon, General Counsel
Shoshone-Bannock Tribes
P. O. Box 83203
Fort Hall, Idaho 83203

David Heineck, Esq.
Summit Law Group
315 Fifth Avenue South, Suite 1000
Seattle, Washington 98104-2682

Re: United States of America v. FMC Corporation Consent Decree, Civil No. 98-0406-E-BLW (D. Idaho); Approval of Fort Hall Environmental Health Assessment/Study Plan

Dear Mr. Bacon and Mr. Heineck:

This is in response to your letter, dated October 16, 2013, requesting that the Environmental Protection Agency (EPA) review and approve the planned Phase 2 studies described in the "2nd Progress Report, Fort Hall Environmental Health Study," dated August 30, 2013. The request was submitted on behalf of the Tribal and FMC members of the Fort Hall Environmental Health Assessment Study Management Team.

Attachment B of the above-referenced Consent Decree requires that the Assessment/Study Plan and contractor selection for the Fort Hall Environmental Health Assessment, otherwise known as Supplemental Environmental Project No. 14, be submitted to EPA for approval. The Assessment/Study Plan and contractor selection for the Fort Hall Environmental Health Assessment Supplemental Environmental Project was approved by EPA by letter dated, August 17, 2011. The 2nd Progress Report you have submitted describes the completed Phase I feasibility studies. The planned Phase 2 studies are described in the "Methodological and Analytical Path Forward" section of the report.

EPA has reviewed the planned Phase 2 studies, which are described in "Methodological and Analytical Path Forward" section of the report and hereby approves them as part of the approved Assessment/Study Plan.

Any questions you may have should be directed to Kevin Schanilec of my staff, who can be reached at 206-553-1061. Questions from legal counsel should be directed to Andrew Boyd in the Office of Regional Counsel, who can be reached at 206-553-1222.

Sincerely,

Edward J. Kowalski
Director

Printed on Recycled Paper

Eng, Sharon

From: Boyd, Andrew
Sent: Friday, October 25, 2013 8:43 AM
To: Linett, Janice
Cc: Ordine, Charles; Eng, Sharon
Subject: Requested Tribal letter concerning FMC request for acknowldegment of completion, dated 10/26/09 - attached
Attachments: FMC - Tribes ltr on req for ack of compl 10 26 09.pdf

Andrew Boyd
U.S. EPA, Region 10
Tel: (206) 553-1222
boyd.andrew@epa.gov
SENSITIVE COMMUNICATION INTENDED ONLY
FOR USE OF RECEPIENTS NAMED ABOVE

The SHOSHONE-BANNOCK TRIBES

FORT HALL INDIAN RESERVATION
PHONE (208) 478-3700
FAX # (208) 237-0797

FORT HALL BUSINESS COUNCIL
P.O. BOX 306
FORT HALL, IDAHO 83203

RECEIVED
OCT 28 2009
U.S. EPA REGION 10
OFFICE OF REGIONAL COUNSEL

October 26, 2009

Ms. Lisa P. Jackson, Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

Mr. Ronald A. Kreizenbeck
Deputy Regional Administrator
United States EPA, Region 10
1200 Sixth Avenue
Seattle, Washington 98101

Mr. Andy Boyd
EPA Region X Legal Counsel
United States EPA, Region 10
1200 Sixth Avenue
Seattle, Washington 98101

Acting Director
American Indian Environmental Office
U.S. Environmental Protection Agency
1200 Pennsylvania Ave., N.W.
Washington, D.C. 20460

Re: United States v. FMC Corporation, Case No. CIV-98-0406-E-BLW
FMC Request for Issuance of an Acknowledgement of Completion, enforcement of the Shoshone-Bannock Tribes' rights under the FMC RCRA Consent Decree, and completion of the SEP 14 Health Study

Dear Ms. Jackson and Gentlemen:

The purpose of this letter is to express the Tribes' strong objection to FMC Corporation's request for issuance of an Acknowledgement of Completion[1] ("AOC") under the RCRA Consent

[1] The requirements of the Consent Decree continue until completion of the "work" required by the Consent Decree. The meaning of the "work" to be completed under the Consent Decree is defined specifically and broadly as: "all activities Defendant is required to perform under this Consent Decree, together with all its Attachments, except those required by Section XX (Records Retention)." The completion of the work is marked by the issuance of an "Acknowledgement of Completion" by EPA to FMC, with notice to the Tribes and an opportunity for a final inspection by the Tribes. There is no dispute that no "Acknowledgement of Completion" has been issued in this case. Until the EPA issues an "Acknowledgement of Completion" to FMC for work required under the Consent Decree (and the Tribes are notified of the issuance and thereafter given an inspection opportunity), the work under the Consent Decree is incomplete and the FMC's obligations under the Consent Decree (including FMC's obligation to obtain Tribal land use permits) continue. The issuance of an Acknowledgement of Completion signifies that FMC's work obligations under the Consent Decree are finished and facilitates closure of FMC's Consent Decree obligations. Title XI paragraph 38 of the Consent Decree provides that the Tribes will be given a reasonable

Decree in the above-referenced case in the Idaho Federal District Court. For the reasons set forth below, the Shoshone-Bannock Tribes request that EPA not issue the Acknowledgement of Completion of all the Work required under the Consent Decree until FMC fully completes all aspects of the required Work and complies with all of its obligations under the Consent Decree.[2] The Tribes object to issuance of an AOC because FMC has substantially failed to fulfill its obligations required by the Consent Decree including, but not limited to, the following:

- FMC has failed to apply for and obtain required Tribal land use permits for its waste storage activities as required by the Consent Decree. (Consent Decree, Section IV, ¶ 8.)
- FMC has for many years continued to deny the Tribes' access to the FMC site in violation of the Consent Decree. (Consent Decree, ¶ 13.)
- FMC has for years continually denied the Tribes access to data and documentation relating to the FMC site and waste storage activities. (¶¶ 16, 21, 66.)
- FMC has failed to complete the RCRA Consent Decree Supplemental Environmental Project No. 14 ("SEP 14") health study to address the effects of FMC's activities on the health of Tribal members and Reservation residents.
- FMC has not completed the Consent Decree "Work" as defined by the Decree and its Attachments. Environmental contamination at the FMC site since the date of the Consent Decree has demonstrated that the closure plans are inadequate and must be amended accordingly.

The above-listed unfulfilled obligations of FMC under the Consent Decree, which are more fully discussed below, must be complete before an AOC may be issued under the Consent Decree. Issuance of an Acknowledgement of Completion by EPA at this time in light of FMC's non-compliance with the Consent Decree requirements would be a violation of the terms of the Decree and a breach of the United States' trust responsibility and obligations to the Shoshone-Bannock Tribes.

1. FMC's failure to comply with the Consent Decree's Tribal permitting requirements

From 1998 to 2001, FMC complied with the Consent Decree requirement to obtain required Tribal permits for their waste activity. However, since 2001, FMC has failed to comply with the Tribal permit requirement and permit fees are owed by FMC for 2002 to present. The Tribal permit issue is presently before the Tribal Court of Appeals. Therefore, issuance of an AOC before FMC complies with Tribal permit requirements would be premature.

---

opportunity for review and comment before any Acknowledgment of Completion can be issued. The Tribes have not been afforded this opportunity.

[2] The Consent Decree gives the Tribes the following express and specific rights: 1) FMC is required to provide the Tribes with notice of any change in ownership, ¶ 5; 2) FMC is required to comply with Tribal law, ¶ 7; 3) FMC is required to apply for Tribal permits, ¶ 8; 4) the Tribes are granted access rights to the FMC site for 6 specific purposes, ¶ 13; 5) the Tribes have a right to copies of sampling conducted at the FMC site, ¶ 16; 6) notice rights, ¶ 21; 7) access to information (documents) relating to FMC's work under the Consent Decree, ¶ 66; 8) right to a Tribal health study (SEP 14).

Section IV (General Provisions) of the Consent Decree clearly requires FMC to apply for and obtain all necessary Tribal permits for work performed pursuant to the Consent Decree. Paragraphs 7 and 8 of Section IV provide:

> 7. Compliance With Applicable Law: All activities undertaken by Defendant pursuant to this Consent Decree shall be performed in accordance with the requirements of all applicable federal, state and local laws, permits, and regulations, including, without limitations, federal and state regulations governing the generation, treatment, storage, transport, and disposal of hazardous waste.
>
> 8. Permits. Where any portion of the Work requires a federal, state, or ***tribal*** permit or approval, Defendant shall submit timely and complete applications and take all other actions necessary to obtain all such permits or approvals.

(Consent Decree at Section IV, ¶¶ 7-8) (emphasis added). FMC's obligation to apply for ***and obtain*** Tribal land use permits continues until the "Work" under the Consent Decree is completed. The "Work" under the Consent Decree is broadly defined as "all activities Defendant [FMC] is required to perform under this Consent Decree, together with its Attachments, except those required by Section XX (Record Retention)" (Consent Decree, Section I at pg. 5.) The "Work" activity is not limited to attachments A and B according to the plain language of the consent decree. Applying for and obtaining required Tribal permits is clearly one of the required activities under the Consent Decree. For a number of years there was no question by the Tribes, FMC, or EPA that the Consent Decree required FMC to obtain a Tribal Special Use Permit for the their waste activities, FMC obtained a Tribal special use permit and paid an annual permit fee of 1.5 million dollars in 1998, 1999, 2000, and 2001. However, in spite of the clear requirement for FMC to apply for and obtain Tribal permits, FMC has since refused (and continues to refuse) to obtain Tribal land use permits for work activities at the FMC property.

As early as 2003, the Tribes urged the federal government (EPA Region 10 officials) to enforce the Tribal rights in the Consent Decree. The government, through the EPA, advised the Tribes these were Tribal matters and urged the Tribes to pursue any breach of the Consent Decree independently. In other words, when it came to enforcing Tribal rights in the Consent Decree, EPA would not (and did not) assist.

As a result of the government's refusal or failure to act, and acting upon EPA's recommendation, on September 19, 2005 the Tribes filed a Motion for Clarification and Application for Preliminary Injunction in the Idaho Federal District Court seeking to clarify: 1) FMC's obligations to obtain required Tribal land use permits; 2) FMC's obligation to allow Tribal environmental staff access to the FMC site for inspection and monitoring purposes; and 3) FMC's obligations to provide the Tribes with documents relating to the work at the FMC site. In response to the Tribes' Motions, the government filed two briefs and attended oral argument. None of the government's briefs addressed the Tribes' ability to enforce the Tribal rights under the Consent Decree and the government attorney attending the hearing on the Tribes' Motions stated on the record that the government did not want to participate in the hearing or express any

opinion. In sum, the government did not object to or oppose the Tribes' Motions or the Tribes' authority to enforce the Tribal rights under the Consent Decree.

Following briefing and argument before Chief Federal District Judge B. Lynn Winmill, the Court rejected FMC's argument that the Consent Decree does not require FMC to apply for Tribal land use permits. In its Order dated March 6, 2006, the District Court found that the Consent Decree requires FMC to submit to the Shoshone-Bannock Tribes land use permitting system and that FMC has consented to the Tribes' land use regulatory jurisdiction. The Court recognized that the Tribes' letter to FMC dated December 9, 2005 identified the permits that FMC was required to apply for and obtain. The Court's decision specifically recognized that the letter required FMC to apply for and obtain "a ***Special Use Permit for hazardous waste storage, treatment, and disposal***, and an additional building permit for the demolition activities currently underway at the FMC site." (Order dated March 6, 2006 at p.7) (emphasis added). In particular, the Court's decision states:

> FMC argues that "no specific tribal permit has been identified by the Tribes," and thus FMC cannot be compelled to apply for some unspecified permits. The Court disagrees. The Tribes' letter of December 9, 2005, discussed in detail above, identifies the permits FMC must apply for, and describes the legal basis for the Tribes' assertions. This letter puts FMC on notice of the specific permits that the tribes are demanding. ***That is precisely the notice envisioned by the court at the time it approved the Consent Decree.***

(Order at pp.9-10) (citation omitted) (emphasis added). The Court concluded in finding that "FMC is required to apply to the Tribes for the permits listed in the letter of December 9, 2005" and that "FMC may make its challenges to the applicability of the permits in the Tribal administrative process, and must exhaust that process, or identify a legal exception to the exhaustion doctrine, before seeking relief in this Court." (Order at pp.16-17.)

In the March 6, 2006 decision, the Court further found that the "consensual relationship" exception to the jurisdictional test set forth in Montana v. United States, 450 U.S. 544 (1981) has been met in this case by virtue of: 1) FMC's 1998 agreement to settle the waste permit dispute; 2) the Consent Decree itself in which FMC agrees to obtain Tribal land use permits; and 3) FMC's August 11, 1997 letter to the Tribes in which FMC stated that "[t]hrough the submittal of the Tribal 'Building Permit Application' and the Tribal 'Use Permit Application' for Ponds 17, 18, and 19, FMC Corporation is consenting to the jurisdiction of the Shoshone-Bannock Tribes with regard to the zoning and permitting requirements as specified in the current Fort Hall Land Use Operative Policy Guidelines." A copy of the August 11, 1997 letter is enclosed for your reference. The Court accordingly ordered FMC to submit applications for Tribal land permits for its waste activities and plant dismantling work. A copy of the Court's decision and order is enclosed for your reference.

In April of 2007, Shoshone-Bannock Tribal leaders and legal counsel met with DOJ/EPA officials in Washington, D.C. to ask for the support of the United States in upholding the Idaho Federal District Court's March 6, 2006 order requiring FMC to apply for and obtain Tribal land use permits. The Tribes urged the government to take a position in the 9th Circuit FMC appeal

that advocates affirming the District Court's March 6, 2006 decision, while limiting the District Court's decision to the unique facts of this case listed above. In spite of EPA's position that the Tribes should independently seek to enforce the Consent Decree Tribal rights in the District Court and the United States' silence before the District Court in that effort, the United States filed an amicus brief in the 9th Circuit appeal that took the damaging position that the Tribes did not have the independent authority to enforce the Consent Decree as a third party beneficiary.

The Ninth Circuit subsequently held on appeal that the Tribes, as a third party beneficiary to the government Consent Decree, could not independently enforce the Consent Decree against FMC. However, the Ninth Circuit's decision did not disturb the District Court's interpretation of the Tribes' jurisdiction over FMC or the Court's finding that the Consent Decree required FMC to obtain the Tribal land use permits identified by the Tribes. The Ninth Circuit also acknowledged FMC's representation in oral argument that FMC would continue to participate in the Tribes' land use permitting application process. There is currently a Tribal Court appeal pending regarding FMC's land use permitting applications. Because FMC has to date failed to obtain the required Tribal land use permits, issuance of an Acknowledgment of Completion by EPA would be improper. This is consistent with the District Court's directive that FMC must exhaust the Tribal Court process before seeking further relief from the Court.

Meaningful enforcement of the FMC Consent Decree and recognition of the Tribes' land use permitting jurisdiction over FMC is of critical importance to the Shoshone-Bannock Tribes' efforts to address the thousands of tons of waste FMC has produced and currently stores on the Fort Hall Reservation. FMC continues its refusal to obtain Tribal permits, refuses to allow Tribal land use personnel to inspect the FMC site, and refuses to provide the Tribes documentation relating to the work under the Consent Decree and associated waste activities. These requirements are specifically included in the Consent Decree and the Tribes' ability to exercise and enforce these rights is extremely important to the Tribal government's sovereign authority over Reservation affairs. The United States should not issue an AOC to FMC unless and until FMC fully complies with the Consent Decree including the clear requirement that FMC apply for and ***obtain*** required Tribal land use permits.

2. **FMC's failure to complete the required Fort Hall Environmental Health Assessment (Supplemental Environmental Project No. 14)**

Attachment B to the Consent Decree requires FMC to complete a number of Supplemental Environmental Projects as part of its Work obligations under the Decree. A critical Supplemental Environmental Project required by the Decree is the Fort Hall Environmental Health Assessment (SEP 14), the purpose of which is to assess the effects of FMC's waste and pollution activities on the health of Tribal members and residents of the Fort Hall Reservation. SEP 14 requires FMC to commit a *minimum* of $1,650,000 to fund a study of the potential human health effects on residents of the Fort Hall Reservation that may have resulted from releases of hazardous substances from RCRA waste management units and other sources at the FMC Pocatello facility. This important health study is intended to evaluate both direct human exposure pathways (air, water, and soil) and indirect pathways (food, plants, fish,

and animals). In accordance with EPA's SEP Policy, the project will provide diagnostic, preventative, and/or remedial components to human health care for Tribal members and residents of the Fort Hall Reservation. FMC has not completed the Fort Hall Environmental Health Assessment (SEP 14) required by the Consent Decree. Further, FMC has not committed the required minimum funds for the study. It is our understanding that FMC has committed only a portion of the funds required to complete this study. Until FMC completely funds the completion of the Fort Hall Environmental Health Assessment, issuance of an Acknowledgment of Completion to EPA is improper. In addition, a meaningful role for the Tribes in the SEP 14 project has been hindered by FMC's unreasonable efforts to limit funding for the Tribes' SEP 14 participation. It is of serious concern to the Tribes that EPA would consider allowing FMC to escape this critical aspect of the Consent Decree, particularly where the required Health Assessment directly addresses the impact of FMC's waste and pollution activities on the health and welfare of members of the Shoshone-Bannock Tribes residing on the Fort Hall Reservation and other Reservation residents.

FMC has attempted to justify its near-complete failure to complete the SEP 14 by leveling false and unsubstantiated accusations of delay at Tribal leaders and Tribal members. In fact, FMC has previously asked the EPA to exercise its discretion under Attachment B, Paragraphs 7 and 17 of the Consent Decree to excuse any civil penalty amounts associated with uncompleted SEPs. It is clear that FMC has never had any serious intention of completing the project and is attempting to blame others for its failures. The SEP 14 project is a critical element and important benefit of the Consent Decree to the Shoshone-Bannock Tribes. As the Tribes' trustee, the United States cannot allow FMC to avoid its SEP 14 obligation by accepting the minimal effort and funding contribution made by FMC thus far. On February 2, 2006, the EPA Region Director of the Office of Air, Waste and Toxics stated that "[EPA] would like to see the project [SEP 14] continued." The EPA should continue to insist that FMC complete the SEP 14 project. If the EPA allows FMC to escape its court-ordered obligation to complete SEP 14, the failure to complete SEP 14 would be a clear violation of the Consent Decree and a clear breach of the United States' trust responsibility to the Shoshone-Bannock Tribes and its membership.

3. **FMC's failure to complete the Consent Decree "Work" as defined by the Decree**

The 1999 Consent Decree entered in United States v. FMC Corporation, Case No. CV-98-0406-E-BLW requires FMC to undertake a number of work activities to address the extensive environmental impacts of its business activities at the FMC Pocatello Plant. As stated above, the "Work" under the Consent Decree is defined as "all activities Defendant [FMC] is required to perform under this Consent Decree, together with its Attachments, except those required by Section XX (Record Retention)" (Consent Decree, Section I at pg. 5.) The "Consent Decree" is defined as the "Decree and all Attachments listed in Section XXIII, including Appendices thereto and incorporated plans, and any modifications thereto made in accordance with Section XXIV (Modifications) of this Consent Decree." Section XXIII (Attachments) provides:

> The following Attachments are physically attached to and incorporated into this Consent Decree: "Attachment A" is the Compliance Schedule; "Attachment B" is the requirements for Supplemental Environmental Projects to be undertaken by Defendant. "Attachment C" is the description of and schedule for the Environmental Management Systems Audit to be undertaken by Defendant. Appendices to Attachments A and B, and plans specifically identified in these Attachments and Appendices as incorporated by reference, are also enforceable under this Consent Decree.

(Consent Decree, Section XXIII, ¶ 80, at pg. 44.) Attachment A to the Consent Decree requires FMC to submit closure plans for surface impoundments at the FMC Pocatello Plant. These closure plans include work for both closure and post-closure of the surface impoundments.

The post-closure work included within the plans and specifically identified in these Attachments and Appendices, which are incorporated into and made part of the Consent Decree, are part of the "Work" that must be completed before an Acknowledgement of Completion can be issued to FMC. Section XI, ¶¶ 36-38 of the Consent Decree requires that "all phases" of "the Work" must be certified as complete before FMC may submit a Request for Acknowledgment of Completion. These provisions of the Decree also provide that the Tribes must be invited to attend any inspection of the FMC site to review the certified portion of the work, and further that the Tribes will be given "a reasonable opportunity for review and comment" on FMC's request for an Acknowledgment of Completion before EPA may issue such an acknowledgment. In addition to FMC's failure to comply with the Tribal permitting requirements discussed above, FMC has not completed all phases of the work activities addressed in the Attachments and Appendices to the Consent Decree, including FMC's post-closure work obligations related to the waste Ponds.

The Consent Decree work is also far from complete because the waste storage ponds have exhibited continued problems that demonstrate their instability and risk of serious environmental contamination. For example, the well documented problems associated with actual and threatened releases from the waste ponds demonstrates the very real interest the Tribes have in regulating FMC's waste storage activity on the Fort Hall Reservation.

Because FMC has not completed all phases of the "Work" obligations outlined in the Consent Decree, issuance of an Acknowledgement of Completion is inappropriate. In its March 6, 2006 Memorandum Decision and Order, the Judge Winmill stated:

> The Government did file a brief in this matter basically taking no position. The Court's rulings, and a possible appeal by FMC, at least raise the question whether the EPA might be ready to issue an Acknowledgment of Completion to FMC before FMC exhausts the Tribal permit process. The Court will not express an opinion at this time as to whether the EPA could issue an Acknowledgement of Completion under the Consent Decree before FMC has completed the Tribal permit process. That issue has not been briefed or argued. It is enough to say at

> this point that the Court would expect the EPA to keep all parties, including the Tribes, notified of its progress with regard to the approval of FMC's work, and give the Tribes full advance notice of any intent to issue an Acknowledgement of Completion to FMC.

(Memorandum Decision and Order dated March 6, 2006 at pg. 17.)

As suggested by the Court, the Tribes expect EPA to give the Tribes advance notice of any intention to issue an Acknowledgement of Completion. Specifically, the Tribes request that EPA give the Tribes at least ten (10) days advance written notice of any intention to issue to FMC an Acknowledgment of Completion under the Consent Decree. The Tribes also request an opportunity to inspect the site and review and verify the voluminous amount of information submitted by FMC in their List of Enclosures as attached to FMC's February 14, 2006 request for issuance of an Acknowledgment of Completion. Once complete, the Tribes will submit further comments on FMC's request. The Tribes also request an opportunity to meet with EPA officials prior to any issuance of an Acknowledgment of Completion.

Should EPA elect to issue an Acknowledgement of Completion before FMC complies with the Tribal permitting requirements and fully completes all phases of the Work activities outlined in the Consent Decree and its Attachments and Appendices, the Tribes would view such action as a violation of the Consent Decree and a serious breach of the United States' trust responsibility and obligations to the Shoshone-Bannock Tribes.

The Tribes maintain that the numerous express and specific Tribal rights in the Consent Decree, together with the special trust relationship of the government to the Tribes, and the government's advice that the Tribes pursue this matter on their own behalf justifies a renewed effort on behalf of the EPA and DOJ to enforce Tribal rights in the Consent Decree. We find it perplexing that the government has in one breath refused to enforce the Tribes' rights under the Consent Decree and urged the Tribes to take independent enforcement action and in the next breath taken the contradictory position that the Tribes do not have standing to enforce the terms of the Consent Decree that apply to the Tribes. The 9th Circuit's decision in the FMC case makes it clear that United States holds the authority and responsibility to enforce the Tribal rights under the Consent Decree. If the Tribes cannot enforce those rights independently and the United States does not enforce them then those rights are meaningless. This is not what the Tribes understood when those rights were negotiated and included in the Consent Decree.

As the government knows, it was the Tribes that contacted EPA regarding FMC's RCRA violations that resulted in the largest RCRA penalty in EPA history. That litigation also resulted in the Consent Decree. On May 18, 1999, the Tribes were allowed to intervene in the action by the government against FMC for the RCRA violations. Even though the Consent Decree expressly provides the Tribes with certain rights, the Tribes opposed the entry of the consent decree. It is also now clear the FMC hazardous waste ponds present a clear and imminent danger to human health given the recent unilateral administrative order issued by the EPA. Furthermore, the LDR restrictions are now fully implemented and prohibit the placement of untreated reactive and ignitable constituents in surface impoundments. It is the Tribes' position

that there is ample evidence (i.e. the smoking pond 16s) under RCRA laws and regulations that requires EPA to reopen the Consent Decree to at least amend the post closure plans and to amend the decree closure remedy. If EPA remains unwilling to enforce the unfulfilled requirements of the Consent Decree against FMC, and in light of the ongoing problems with the waste storage ponds, then the Consent Decree should be reopened, amended, or set aside so that FMC's violations of RCRA can be properly addressed with appropriate remedies that fulfill the purpose of the environmental laws EPA is charged with enforcing.

The time is long overdue for EPA to actively begin meaningful enforcement proceedings regarding FMC's failure to comply with the Tribal rights expressly set forth in the Consent Decree.

Sincerely,

Alonzo Coby, Chairman
Fort Hall Business Council

Paul C. EchoHawk
Special Tribal Counsel

cc: Tom Hungar, Deputy Solicitor General
Doug Hallward-Driemeier, Assistant Solicitor
General James Kilbourne, Chief, Appellate Section, ENRD
Lisa Jones, Assistant Chief, Appellate Section, ENRD
Robert Maher, Assistant Chief, Environment Enforcement Section, ENRD
David Coursen, EPA Office of General Counsel
Mary Gleaves, EPA Office of General Counsel
Leslie Oif, EPA Office of Enforcement and Compliance Assurance
Ed Kowalski, EPA Region X
Gina Allery, Indian Resources Section, ENRD
Fort Hall Business Council
Shoshone-Bannock Tribes Land Use Policy Commission
K. Wright, Tribal Environmental Waste Management Program Manager
Susan Hanson, Consultant, Shoshone-Bannock Tribes

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FMC Corporation

Phosphorus Chemicals Division
PO Box 4111
Pocatello, Idaho 83205
(208) 236-8200

August 11, 1997

HAND DELIVERY

Mr. Tony Galloway
Land Use Chairman
Shoshone-Bannock Tribes
P. O. Box 306
Fort Hall, Idaho 83203

Dear Mr. Galloway:

Through the submittal of the Tribal "Building Permit Application" and the Tribal "Use Permit Application" for Ponds 17, 18, and 19, FMC Corporation is consenting to the jurisdiction of the Shoshone-Bannock Tribes with regard to the zoning and permitting requirements as specified in the current Fort Hall Land Use Operative Policy Guidelines.

Sincerely,

J. David Buttelman
Health, Safety, and Environmental Manager

8-11-1997

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

UNITED STATES OF AMERICA, Plaintiff, v. FMC CORPORATION, Defendant, v. SHOSHONE-BANNOCK TRIBES, Intervenor.	Case No. CV-98-0406-E-BLW **MEMORANDUM DECISION AND ORDER**

INTRODUCTION

The Court has before it the Tribes' Motion for Clarification and Application for Preliminary Injunction. The Court heard oral argument on February 16, 2006, and took both motions under advisement. For the reasons expressed below, the Court will grant the Motion for Clarification and deem moot the Application for Preliminary Injunction.

FACTUAL BACKGROUND

FMC produced phosphorus at a plant located on fee land within the Shoshone-Bannock Fort Hall Reservation. FMC historically stored the waste from its plant in ponds on that property.

FMC's waste storage system was challenged by the Government in 1997 as being in violation of the Resource Conservation and Recovery Act (RCRA). The Government, FMC, and the Tribes entered into negotiations over these charges. At the same time, FMC was negotiating with the Tribes over whether FMC had to obtain a Tribal waste permit to conduct its waste storage program.

In 1998, FMC's negotiations on both fronts resulted in agreements. FMC settled the waste permit issue by entering into an agreement with the Tribes formed by a series of letters. In a letter dated May 19, 1998, the Tribes set forth the terms of the agreement in detail, providing that FMC would pay the Tribes a fee of $1.5 million a year to cover hazardous and nonhazardous waste, beginning in 1998, and continuing "for every year thereafter . . . ." *See Exhibit 2*, letter dated May 19, 1998. FMC responded in a letter dated June 2, 1998, clarifying the terms to ensure that the "$1.5 million annual fee would continue to be paid for the future even if the use of the ponds 17-19 was terminated in the next several years." *See Exhibit F to Declaration of Edmo*.

A few months after entering into that agreement with the Tribes, FMC settled its RCRA dispute with the Government by signing a Consent Decree. It required FMC to build a Land Disposal Restriction Treatment Plant (LDR Plant) to treat the waste and eliminate the waste storage ponds on its work site. The project was labeled in the Decree as the "Work," and the Decree set a deadline for FMC to complete the "Work."

The Government did file suit against FMC under RCRA, but simultaneously presented the Consent Decree to this Court for approval to settle the suit. The Tribe objected to the Decree, and the Court allowed the Tribes to intervene to present its objections. After hearing from all parties, the Court approved the Decree, *see Order filed July 13, 1999* (docket no. 27), and the Ninth Circuit affirmed that decision. *See United States v. Shoshone-Bannock Tribes,* 229 F.3d 1161 (unpublished disposition) (9th Cir. 2000).

To begin construction of the LDR Plant, FMC applied for a building permit with the Tribes. The Tribes' Land Use Planning Council (LUPC) denied the permit, and demanded that all construction cease. FMC grew concerned that lengthy appeals through the Tribes' administrative process would affect its ability to meet the Government's deadline for work completion. Consequently, FMC moved for a declaratory judgment in this Court that it had complied with the

requirement in the Consent Decree that it apply for all necessary permits, and that it should be allowed to continue construction despite the Tribes' denial of the application.

The Court began its analysis of FMC's motion by affirming FMC's reading of the Consent Decree that it was required to apply for a Tribal permit:

> The Consent Decree itself contemplated that FMC would need to go through the Tribes' land use planning system. Specifically, paragraph 8 of the Agreement states that "[w]here any portion of the Work requires a . . . tribal permit or approval, [FMC] shall submit timely and complete applications and take all other actions necessary to obtain all such permits or approvals."

See Memorandum Decision filed January 18, 2001 at p. 2 (Docket No. 56). Not only was FMC required to apply for the permit, the Court held, but it also was required to proceed through the Tribes' administrative process before bringing a challenge in this Court: "By waiting until the Tribal appellate entities had a full opportunity to review the LUPC's decision, the Court would be recognizing the Tribes' sovereignty over land use issues for projects with Reservation boundaries." *Id.* at p. 4 (citing *National Farmers Union Ins. v. Crow Tribe of Indians*, 471 U.S. 845 (1985)). The Court therefore denied FMC's motion, and directed it to proceed with an appeal though the Tribal administrative process.

During this time period – from 1998 to 2001 – FMC had been paying to the Tribes each year the $1.5 million waste fee agreed upon in the series of letters

discussed above. In December of 2001, FMC ceased all mineral processing operations at the site. *See Bartholomew Declaration* at ¶ 16, p. 10 (John Bartholomew is FMC's Director of Operations). Shortly thereafter, FMC declined to pay the $1.5 million fee for the year 2002.

In a letter dated May 10, 2002, Blaine Edmo, the Chairman of the Fort Hall Business Council, demanded that FMC pay the fee. FMC responded in a letter dated May 23, 2002. That letter contained an attached memo, from FMC's Legal Department, entitled "FMC Legal Comments re: Tribal Waste Fee." The memo concluded that FMC no longer owed the fee because, among other reasons, the Tribes failed to comply with a condition of the agreement. More specifically, FMC argued that the agreement required the Tribe to codify the fee to "ensure that [it] remains the same in the future." *See Exhibit F to Declaration of Edmo*. FMC asserted that because the Tribes had never codified the fee, FMC's obligation had ended.

The memo goes on to add that because FMC is no longer disposing of waste in ponds 17-19, no waste permit requirement could apply to those ponds. Although the waste ponds continued to exist on the property, FMC cited the waste permit ordinance relied upon by the Tribes, and interpreted it to apply only to "the act of disposal itself, rather than the mere existence of the disposal unit

[*i.e.*, ponds]." *See Exhibit F to Edmo Declaration.*

Negotiations over the waste fee continued. In 2003, FMC proposed to transfer ownership of certain property to the Tribes "in lieu of paying the permit fee." *See Edmo Declaration* ¶ 13, p. 4.

Also during this period, FMC and the Tribes were negotiating over the Tribes' demand that FMC obtain a building permit to disassemble the FMC plant. When FMC questioned whether a building permit was required, the Tribes responded with a letter dated May 5, 2004, setting forth in detail the applicable sections of the Tribes' Land Use Policy Ordinance and the Uniform Building Code. The Tribes demanded that all work cease until FMC obtained the building permit.

At this point, the Tribes were demanding that FMC (1) pay the $1.5 million annual waste fee, and (2) obtain a building permit for the disassembly work. The Tribes were threatening to bring an enforcement action to halt FMC's work unless FMC agreed to these demands.

FMC responded on May 27, 2004, by repeating its offer to transfer land to the Tribes in return for the Tribes staying any regulatory enforcement of their demands. Further negotiations ensued, as evidenced by letters in the record. They were not successful.

On September 19, 2005, the Tribes filed in this Court a Motion for Clarification of Consent Decree. By that motion, the Tribes seek to (1) conduct site inspections of FMC's work, (2) receive FMC documentation of work activities, and (3) require FMC to apply for a Tribal building permit and a waste permit.

In a letter dated December 9, 2005, the Tribes identified the permits they demanded that FMC obtain. The letter stated in pertinent part that FMC was required to "apply for and obtain a Special Use Permit for hazardous waste storage, treatment, and disposal, and an additional building permit for the demolition activities currently underway at the FMC site." The letter went on to detail the specific provisions of Tribal ordinances that required FMC to obtain these permits.

FMC has persisted in refusing to apply for these permits, although the Tribes concede that FMC has "to some degree relented in its refusal to allow Tribal inspections and provide requested documents." *See Tribes' Reply Brief on Motion for Clarification* at p. 3. Consistent with that representation, the oral argument of all counsel before this Court focused exclusively on the permit issues. Accordingly, the Court will assume that no decision is now necessary on the inspection and documentation issues, and that the sole issue is whether the Consent Decree requires FMC to comply with Tribal permitting requirements.

Concerned that their Motion for Clarification may not be resolved before FMC finished its work at the site, the Tribes also moved for a preliminary injunction. Indeed, about a week before this Court's hearing on the Tribes' motions, FMC filed its Certificate of Completion of the "Work" under the Consent Decree with the EPA. All parties agree that the next step is for the EPA to determine whether that "Work" is in fact complete. If it is, the EPA will issue to FMC an Acknowledgment of Completion.

ANALYSIS

1. Motion for Clarification of Consent Decree

To a large degree, the Court's earlier decision of 2001 answers the Tribes' Motion for Clarification: Paragraph 8 of the Consent Decree requires FMC to apply for Tribal permits, and *National Farmers* requires FMC to exhaust its Tribal remedies before seeking relief here.

FMC responds that the Decree only requires it to apply for permits when the "Work" requires a tribal permit. Because it has decided that the waste and building permits are not required, FMC asserts that it need not apply for those permits.

FMC's interpretation removes the Tribe from any role in land use permit decisions – if FMC believes the permit is not required, it need not apply and the Tribe is powerless to argue otherwise. However, this is not at all what the Court

contemplated when it approved the Consent Decree. At that time, the Court read the Consent Decree not to give FMC complete discretion to determine which permits were required, but instead to require FMC to apply for those Tribal permits that the Tribe had specifically identified as required. On the basis of that interpretation, the Court approved the Consent Decree. Consistent with that reading, the Court stated, in denying FMC's motion for declaratory judgment, that the Court was "recognizing the Tribes' sovereignty over land use issues for projects within Reservation boundaries." *See Memorandum Decision* at p. 4.

There is no indication whatsoever in the Decree that the Tribe was being stripped of that sovereignty. The only reasonable interpretation of ¶ 8 is that it requires FMC to apply for those permits that the Tribes had specifically identified as being required. At the same time, ¶ 8 does not dictate any result. Paragraph 76 of the Decree states that it "shall not be construed as a ruling or determination of any issue related to any . . . tribal . . . permit . . . ." While it does not dictate results, ¶ 76 reaffirms ¶ 8 by requiring that FMC "shall remain subject to all such permitting requirements."

FMC argues that "no specific tribal permit has been identified by the Tribes," and thus FMC cannot be compelled to apply for some unspecified permits. *See FMC Brief on Motion for Clarification* at p. 7. The Court disagrees.

The Tribes' letter of December 9, 2005, discussed in detail above, identifies the permits FMC must apply for, and describes the legal basis for the Tribes' assertions. This letter puts FMC on notice of the specific permits that the Tribes are demanding. That is precisely the notice envisioned by the Court at the time it approved the Consent Decree.

FMC argues next that the Tribes are not signatories to the Decree and cannot claim third-party beneficiary status. Generally, consent decrees are governed by principles of contract law. *Hook v. State of Arizona*, 972, F.2d 1012, 1015 (9th Cir. 1992). "In contract law, third party beneficiaries of the government's rights under a contract are normally assumed to be only incidental [not intended] beneficiaries and are precluded from enforcing the contract absent a clear expression of a different intent." *Id.*

The Decree at issue here contains numerous indications that the Tribes are an intended third party beneficiary. At the very beginning of the Decree, in the Definitions section, the word "Tribe" is defined as "the Shoshone-Bannock Tribe residing on the Fort Hall Reservation . . . ." That definition is necessary because the word "Tribe" is frequently mentioned throughout the Decree as the recipient of various benefits, including, but not limited to, the following: (1) To receive notification from FMC of any change of ownership in the plant, *see* ¶ 7; (2) To

require FMC to apply for Tribal permits, *see* ¶ 8; (3) To obtain "access at all reasonable times" to the plant for various enumerated purposes, *see* ¶ 13; (4) To receive notices required by the Decree, *see* ¶¶ 19-21; (5) To be invited to attend any inspection conducted by the EPA after FMC files its Certificate of Completion, *see* ¶ 36; and (6) For "a reasonable opportunity for review and comment" before the EPA issues any Acknowledgment of Completion to FMC, *see* ¶ 38.

By conferring numerous benefits on the Tribes, the parties to the Decree make it clear that the Tribes are an intended – and not merely an incidental – beneficiary. FMC responds, however, that ¶ 77 of the Decree disclaims any intent to benefit the Tribes. That provision states that "[n]othing in this Consent Decree is intended . . . to create any rights in or grant any cause of action to any person not a party to this Consent Decree . . . ." FMC argues that this provision bars the Tribes from claiming third-party beneficiary status.

The Court disagrees for two reasons. First, ¶ 77 fails to mention the term "third-party beneficiary." It would have been easy to name the doctrine and exclude it from application. The Paragraph's failure to do so is a strong indication that it did not intend to do so.

Second, ¶ 77 only applies to "*any person* not a party." While corporations and other legal entities may be defined as "persons" at times, the Tribes are not a

"person" in either legal or common parlance. Instead, the Tribes are defined in the Decree itself, not as a "person," but as the "Shoshone-Bannock Tribe."

Given the fact that preceding paragraphs of the Decree had conferred numerous benefits on the Tribes, it would have been odd indeed for ¶ 77 to withdraw them all – essentially saying "never-mind." Because the language of ¶ 77 cannot remotely be interpreted to command such an absurd result, the Court rejects FMC's interpretation.

FMC argues next that its work is done, and thus there is no work left that might be covered by a permit. That is essentially an argument that the permits identified by the Tribes do not apply. That argument may be submitted by FMC in the Tribal administrative process, and must be exhausted there before being raised in this Court.

FMC responds that the Tribes failed to follow the Dispute Resolution process outlined in ¶ 55 of the Consent Decree. However, that provision is applicable only to "parties," and that word is defined in the Definitions section to include only the Government and FMC, not the Tribes.

2. <u>CERCLA and the Motion for Clarification</u>

The FMC plant site is a CERCLA Superfund Site. *See Declaration of Hartman*, ¶ 5, at p. 3. The Consent Decree covers only RCRA work, and does not

cover the clean-up work FMC is doing under CERCLA supervised by the EPA.

FMC argues that the Tribes, through their permitting process, will require FMC to do work beyond that required by the Consent Decree and which is covered by CERCLA. For example, FMC points to the Tribes' complaints about radionuclides and potential groundwater discharges to the Portneuf River, and alleges that any Tribal permit requirements that FMC perform work in these areas would invade the province of the EPA's CERCLA clean-up efforts.

Because FMC has not yet applied for Tribal permits, the Court has no way of knowing what the Tribes will require in granting or denying those permits. Thus, this dispute is not yet ripe. Resolution of this issue must await FMC's permit applications and the Tribes' action on those applications.

3. Tribal Jurisdiction Over FMC

Finally, FMC argues that the Tribe lacks jurisdiction. In *Montana v. United States*, 450 U.S. 544 (1981), the Supreme Court held that with two exceptions, the "inherent sovereign powers of an Indian tribe do not extend to the activities of non-members of the tribe" on privately-owned fee lands within a reservation. *Id.* at 565. FMC owns the property at issue in fee. *See Bartholomew Declaration* at ¶ 3. Thus, *Montana* establishes that the Tribes have no jurisdiction over FMC unless one of its two exceptions applies.

The first exception provides that "a tribe may regulate through taxation, licensing, or other means, the activities of non-members who enter into consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements." *Id.* at 565-66. There must be a "fairly direct link" between the consensual relationship and the assertion of jurisdiction. *Ford Motor Co. v. Todecheene*, 394 F.3d 1170, 1179 (9th Cir. 2005).

Here, the Tribes and FMC entered into an agreement in 1998 to settle their waste permit dispute. It provided that FMC would pay $1.5 million annually, which it did until 2001, when it unilaterally refused to make further payments.

The payment can only be interpreted as a concession by FMC to Tribal jurisdiction over permitting. Whether FMC was paying the Tribes to obtain a waste permit – or was paying the Tribes to forgo enforcement action for failing to obtain a permit – either way, the payment was a recognition that the Tribes had jurisdiction over FMC to require it to obtain a waste permit.

While in other contexts FMC often expressly reserved its right to object to the Tribes' jurisdiction, there is no similar reservation of rights in the series of letters that comprise the agreement of the parties on the $1.5 million payment.[1]

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[1] At oral argument, the Court asked FMC's counsel to identify where in the letters FMC had reserved its rights, and defense counsel was unable to identify any such reservation.

Indeed, FMC's letter of May 23, 2002, containing its reasons for refusing to pay the $1.5 million fee, says nothing about the Tribes' lack of jurisdiction. Instead, the attached memo from FMC's Legal Department, discussed above, focuses almost entirely on interpretations of the Tribes' Land Use Ordinances, a recognition that those ordinances govern the dispute, and that the Tribe has jurisdiction.

The Court therefore finds that a consensual agreement under Montana exists in this case. *Ford Motor* requires a tight fit between that agreement and the dispute at issue here. That requirement is satisfied because both involve the Tribes' right to enforce its permit system.

FMC argues that the agreement has long-since expired because it applied only during the time that ponds 17-19 were in operation. This ignores, however, the letter of FMC's General Counsel Paul McGrath dated June 2, 1998, stating his understanding that "the $1.5 million annual fee would continue to be paid for the future even if the use of ponds 17-19 was terminated in the next several years." *See Exhibit F to Edmo Declaration.*

However, the agreement on the $1.5 million fee is not the only consensual agreement under *Montana* that exists in this case. The Consent Decree is another example. As the Court discussed above, the Tribes are an intended beneficiary of

that Decree.

A third example comes from an FMC letter to the Tribes dated August 11, 1997, signed by J. David Buttelman, FMC's Health, Safety, and Environmental Manager. In that letter, Buttelman states that "[t]hrough the submittal of the Tribal "Building Permit Application" and the Tribal "Use Permit Application" for Ponds 17, 18, and 19, FMC Corporation is consenting to the jurisdiction of the Shoshone-Bannock Tribes with regard to the zoning and permitting requirements as specified in the current Fort Hall Land Use Operative Policy Guidelines." *See Exhibit 3.*

The consensual agreement exception of *Montana* is satisfied by (1) the agreement on the $1.5 million annual fee, (2) the Consent Decree, and (3) the Bettelman letter. For these reasons, the Tribes have jurisdiction over FMC to enforce the terms of the Tribal permit system.

CONCLUSION

For the reasons expressed above, the Court will grant the Tribes' Motion for Clarification. The Court finds that (1) the Consent Decree requires FMC to apply for permits that the Tribes specifically identify as being required; (2) FMC may not refuse to apply for permits on the ground that FMC does not believe the permits to be applicable; (3) the Tribes have specifically identified the permits listed in the letter of December 9, 2005; (4) FMC is required to apply to the Tribes for the

permits listed in the letter of December 9, 2005; (4) FMC may make its challenges to the applicability of the permits in the Tribal administrative process, and must exhaust that process, or identify a legal exception to the exhaustion doctrine, before seeking relief in this Court.

Given these rulings, the Court will deem moot the Tribes' Motion for Preliminary Injunction, without prejudice to the Tribes' right to re-file an injunction request should it become necessary.

The Government did file a brief in this matter basically taking no position. The Court's rulings, and a possible appeal by FMC, at least raise the question whether the EPA might be ready to issue an Acknowledgment of Completion to FMC before FMC exhausts the Tribal permit process.

The Court will not express an opinion at this time as to whether the EPA could issue an Acknowledgment of Completion under the Consent Decree before FMC had completed the Tribal permit process. That issue has not been briefed or argued. It is enough to say at this point that the Court would expect the EPA to keep all parties, including the Tribes, notified of its progress with regard to the approval of FMC's work, and give the Tribes full advance notice of any intent to issue a Acknowledgment of Completion to FMC.

ORDER

In accordance with the Memorandum Decision set forth above,

NOW THEREFORE IT IS HEREBY ORDERED, that the Motion for Clarification (Docket No. 59) is GRANTED as set forth above.

IT IS FURTHER ORDERED, that the Application for Preliminary Injunction (Docket No. 76) is DEEMED MOOT as discussed above.

DATED: **March 6, 2006**

B. LYNN WINMILL
Chief Judge
United States District Court

Eng, Sharon

From: Boyd, Andrew
Sent: Thursday, October 31, 2013 7:55 AM
To: Lizanne Davis; David Heineck; Bill Bacon
Cc: Eng, Sharon
Subject: FMC SEP 14 approval letter placed in the out going mail on Wednesday - attached
Attachments: FMC SEP 14 Approval dated 10-30-13.pdf

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 10
1200 Sixth Avenue, Suite 900
Seattle, WA 98101-3140

OCT 30 2013

OFFICE OF
COMPLIANCE AND ENFORCEMENT

Reply to: OCE-127

Certified Mail Return Receipt Requested

William Bacon, General Counsel
Shoshone-Bannock Tribes
P. O. Box 83203
Fort Hall, Idaho 83203

David Heineck, Esq.
Summit Law Group
315 Fifth Avenue South, Suite 1000
Seattle, Washington 98104-2682

Re: United States of America v. FMC Corporation Consent Decree, Civil No. 98-0406-E-BLW (D. Idaho); Approval of Fort Hall Environmental Health Assessment/Study Plan

Dear Mr. Bacon and Mr. Heineck:

This is in response to your letter, dated October 16, 2013, requesting that the Environmental Protection Agency (EPA) review and approve the planned Phase 2 studies described in the "2nd Progress Report, Fort Hall Environmental Health Study," dated August 30, 2013. The request was submitted on behalf of the Tribal and FMC members of the Fort Hall Environmental Health Assessment Study Management Team.

Attachment B of the above-referenced Consent Decree requires that the Assessment/Study Plan and contractor selection for the Fort Hall Environmental Health Assessment, otherwise known as Supplemental Environmental Project No. 14, be submitted to EPA for approval. The Assessment/Study Plan and contractor selection for the Fort Hall Environmental Health Assessment Supplemental Environmental Project was approved by EPA by letter dated, August 17, 2011. The 2nd Progress Report you have submitted describes the completed Phase I feasibility studies. The planned Phase 2 studies are described in the "Methodological and Analytical Path Forward" section of the report.

EPA has reviewed the planned Phase 2 studies, which are described in "Methodological and Analytical Path Forward" section of the report and hereby approves them as part of the approved Assessment/Study Plan.

Any questions you may have should be directed to Kevin Schanilec of my staff, who can be reached at 206-553-1061. Questions from legal counsel should be directed to Andrew Boyd in the Office of Regional Counsel, who can be reached at 206-553-1222.

Sincerely,

Edward J. Kowalski
Director

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